

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 645 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? NO.

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge?

NO.

STATE OF GUJARAT

Versus

HUSHANSHA BHADURSHA SHIKH

Appearance:

MR KP RAVAL AP for the appellant

MS HANSA B. PUNANI for respondent

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 10/02/98

ORAL JUDGEMENT

The appellant-State of Gujarat has filed this appeal under Section 378 of the Code of Criminal Procedure (the 'Code' for short), challenging the legality and validity of the judgment and order dated 8-4-92, passed by the learned Chief Judicial Magistrate, Bhuj, in Criminal Case No.1890 of 1991, whereby the

learned Magistrate acquitted the respondent of the offences punishable under Section 25 (1-B) (a) of the Arms Act.

2. P.S.I. Odedara of Bhuj Police Taluka Police Station received an information on 26-4-1991 that the respondent was possessing country made single barrel muzzle loaded gun without license or permit. On receiving the information P.S.I. Odedara obtained search warrant and called two independent Panchas. Preliminary panchnama was drawn at the Police Station and in the presence of the Panchas P.S.I. searched the residential house of the respondent at 12-30 p.m. on 26-4-91 and recovered the country-made single barrel muzzle loaded gun as discussed above. The said gun was seized by panchnama in the presence of the panchas. P.S.I. Odedara after completing the investigation and after obtaining the sanction of the competent authority filed chargesheet against the respondent in the Court of Chief Judicial Magistrate, Bhuj, which was numbered as Criminal Case No.1890 of 1991.

3. The charge Exh.3 came to be framed against the respondent wherein he pleaded not guilty and claimed to be tried.

4. The prosecution in support of his case examined three witnesses namely (i) PW 1 Hajisha Kasamsha at Exh.5, (ii) PW 2 Fatemamad Bhachalsha at Exh.6 and (iii) PW 3 complainant- Rambhai Bhurabhai Odedara, P.S.I. of Bhuj Taluka Police Station at Exh.9. The prosecution also produced documentary evidence mainly consisting of copies of F.I.R., search warrant, panchnama, report of the F.S.L. and sanction order to prosecute the respondent.

5. The learned Chief Judicial Magistrate after recording of the oral as well as documentary evidence questioned the respondent and recorded his statement under Section 313 of the Code.

6. During the trial, the independent witnesses namely panchas PW 1 and PW 2 turned hostile and the evidence of the complainant did not get corroboration from the independent witnesses, and, therefore, the learned Chief Judicial Magistrate acquitted the respondent from the charge which has given rise to filing of this appeal by the State of Gujarat.

7. Learned A.P.P. Mr. K.P.Raval has taken me through the entire evidence on record and submitted that

after considering the evidence of the complainant-P.S.I. Odedara, the learned Judge ought to have held that the respondent was possessing gun without licence or permit. It is submitted by the learned A.P.P. that P.S.I. Odedara has no enmity against the respondent, and therefore, the conviction can be based on sole testimony of the complainant-P.S.I. Odedara, and therefore, this appeal be allowed.

8. On the other hand, on behalf of the respondent, learned advocate Ms.Punani has submitted that the evidence of P.S.I. Odedara does not get corroboration from the independent witnesses, and therefore, benefit of doubt should be given to the respondent and the appeal should be dismissed.

9. I have carefully gone through the evidence of the 2 independent witnesses and the evidence of the P.S.I. Odedara. The prosecution has come out with the case that a gun was found from the possession of the respondent from the residential house. Whether respondent was having conscious possession of the gun is not proved beyond reasonable doubt. The evidence of 2 independent witnesses-panchas does not support the evidence of P.S.I. Odedara. Therefore, it is not proved beyond doubt that the mudamal gun was recovered from the residential house of the respondent in the presence of independent witnesses. It is true that P.S.I. Odedara has deposed that the gun from the residential house of the respondent was recovered, but scanning through the evidence of P.S.I. Odedara, it does not prove that the respondent was possessing the said gun and the residential house from which the gun was recovered belonged to the respondent. Therefore, it is not proved beyond doubt that the respondent was having conscious possession of the gun which was recovered by P.S.I. Odedara. In absence of any corroborative piece of evidence to the oral testimony of P.S.I. Odedara, it would be hazardous to convict the respondent.

10. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to interfere with the order of acquittal more particularly when the evidence has not inspired confidence and the learned Judge who had an advantage of observing demeanour of witnesses. On overall appreciation of evidence, I am satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the

respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convincing me to take the view contrary to the one already taken by the learned Judge. Therefore, the acquittal appeal deserves to be rejected.

11. For the foregoing reasons, I do not find any substance in the appeal. The appeal, therefore, fails and is dismissed. The order of forfeiture of the mudamal-gun shall remain undisturbed.

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(Mithabhai)